

14
Supreme Court, U.S.

FILED

AUG 11 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

BRIEF OF *AMICI CURIAE*
JANE DAUGHERTY, *ET AL.*
IN SUPPORT OF RESPONDENTS
(List of Additional Amici on Inside Cover)

BARBARA HARVEY
925 Ford Building
Detroit, MI 48226
(313) 962-2770
Counsel for Amici Curiae
Jane Daugherty, et al.

Dated: August 11, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



258

Robin Abcarian
Molly Abraham
Susan Ager
Mitch Albom
Patricia Chagot
Catherine Collison
William Collison
Christopher Cook
David Crumm
Owen Davis
Brian Dickerson
John L. Dotson, Jr.
Charles Fancher
Gregory Favre
Jim Fitzgerald
Brian Flanigan
John Goecke
Joe Grimm
Tracee Hamilton
Tim Jones
Georgea Kovanis

Jack Kresnak
David Kushma
Hugh McDiarmid
Jeanne May
Robert Maynard
James Neubacher
Patricia Montemurri
Jeanne Moore
Renee Murawski
Robert Musial
Craig Porter
Gene Roberts
Neal Shine
Tony Spina
Barbara Stanton
Martha Thierry
Jacqueline Thomas
Gerry Volgenau
Michael Wagner
Mariusz Ziomecki
Sharon Zumberg

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE ATTORNEY GENERAL CORRECTLY CONSTRUED AND APPLIED THE STATU- TORY STANDARD	3
II. WHERE THE PROPOSED JOA IS THE ONLY MEANS OF PRESERVING EDITO- RIAL DIVERSITY IN THE COMMUNITY, THE ATTORNEY GENERAL MUST CON- STRUE THE TERM "FAILING NEWSPA- PER" TO EFFECTUATE THE PURPOSE OF THE ACT	6
III. THE APPLICANTS' EDITORIAL PERSPEC- TIVES HAVE BEEN HISTORICALLY AND CONSISTENTLY OPPOSING	9
STATEMENT OF <i>AMICI CURIAE</i>	11
A. Editorial Diversity	12
B. Free Press Coverage of Race Relations	14
C. Free Press Investigative Reporting	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945)	8
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir. 1983)	4, 6, 7, 8
<i>Dawson Chemical Co. v. Rohm & Haas Co.</i> , 448 U.S. 176 (1980)	11
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	7
 Statutes and Regulation:	
<i>Bank Merger Act</i> , 12 U.S.C. § 1828(c)	7
<i>Newspaper Preservation Act</i> , 15 U.S.C. § 1801	6
15 U.S.C. § 1803(b)	5, 8
35 U.S.C. § 271(d)	11
 Miscellaneous:	
1970 U.S. Code Cong. & Admin. News 3547	6
S. 1520, 91st Cong., 1st Sess. (Nov. 18, 1969)	7, 8
B. Bagdikian, <i>The Media Monopoly</i> (1983)	13
S. Fine, <i>Violence in the Model City: The Cavanagh Administration, Race Relations and the Detroit Riot of 1967</i> (1989)	15, 16
S. Lacy, "Content of Joint Operation Newspapers," in <i>Press Concentration and Monopoly</i> (Picard, ed. 1988)	19
National Opinion Research Center, <i>General Social Survey</i> (1967, 1989)	3
M.E. Neithercut, <i>Detroit Twenty Years After: A Statistical Profile of the Detroit Area Since 1967</i> (Center for Urban Studies 1987)	12, 14
<i>Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary</i> , 91st Cong., 1st Sess. (1969)	5, 7
B. Widick, <i>Detroit: City of Race and Class Violence</i> (1989)	15, 16, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.,
Petitioners,
v.RICHARD THORNBURGH,
United States Attorney General, et al.,
Respondents.On Writ of Certiorari to the
United States Court of Appeals
for the District of ColumbiaBRIEF OF AMICI CURIAE
JANE DAUGHERTY, ET AL.
IN SUPPORT OF RESPONDENTSThis brief *amici curiae* is filed with the written consent of all parties.

INTEREST OF AMICI CURIAE

Amici curiae are journalists from around the country, most of them now or previously associated with the Detroit Free Press. All are persuaded, most reluctantly, that the unique editorial vitality and diversity enjoyed by the citizens of Detroit can continue to exist only with the assistance of the Newspaper Preservation Act's provision for a joint operating agreement between the city's two competing newspapers.

SUMMARY OF ARGUMENT

The actual editorial diversity that will be preserved by this JOA is precisely what the Newspaper Preservation Act was designed to accomplish. Congress' intent in enacting the Newspaper Preservation Act was to preserve editorial diversity. While neither Congress nor the Attorney General is free to legislate editorial practice or policy, where such diversity actually exists between the newspaper applicants, approval of the JOA is strongly supported by the legislative intent.

The editorial diversity and competitiveness that Congress intended the Act to preserve have long marked Detroit's newspaper industry. Detroit's JOA applicants have been historically committed to fundamentally diverse, often opposing editorial perspectives. Their differences have enriched the community's perception of news events and furthered public policy debates. Coverage by the Free Press has often been the impetus for community change and reform, especially on issues involving race relations.

Loss of the Free Press would deprive a major city whose population is over 70 percent black of a voice that has been particularly sensitive to the concerns of black citizens. While the applicants' counterbalancing political perspectives enrich the community's political debate, loss of the Free Press would mean that the interests of a city with a long tradition of liberal politics would be represented only by an avowedly conservative newspaper.

Affirmance of the decision of the Court of Appeals will serve both the first amendment interest in the wide dissemination of information from diverse and antagonistic sources that Congress intended, and the interests of the citizens of Detroit and Michigan.

ARGUMENT

I. THE ATTORNEY GENERAL CORRECTLY CONSTRUED AND APPLIED THE STATUTORY STANDARD.

In 1967, three years before the Newspaper Preservation Act was enacted, 73 percent of the adults in the United States read a newspaper every day. By 1989, only 50 percent of the adult population read a newspaper every day.¹

The economics of Detroit's newspaper industry that led to the JOA application is detailed in the Brief of Respondent The Detroit Free Press, Inc., and need not be repeated here. It suffices to note that the Free Press determined, in a process that has not been found to be mismanagement, that long-term economic viability in Detroit required it to achieve market dominance. The News reached the same conclusion, and in the midst of a recession and a steadily declining local economy, the "great Detroit newspaper war" was fought to a stalemate, each competitor, and especially the Free Press, having sustained continuous and enormous losses. John Rosse, an expert in the field of newspaper economics who has testified as a witness in every JOA proceeding, concluded, given

"the Free Press' financial losses since 1980, the significant decline in the size and economic vigor of the Detroit market, and the News' lead in advertising revenues as well as certain key circulation areas, . . . that the Free Press viewed on a stand-alone basis is in probable danger of financial failure and can only be saved by a JOA." ALJ rec. dec. 95.

The administrative law judge concluded that

"[T]here can be no serious question that between 1979-1986 the Free Press had deep operating losses,

¹ National Opinion Research Center, *General Social Surveys* (1967, 1989).

that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other person) it could not continue as a going concern on a stand-alone basis. . . [F]uture profitability could not be accomplished by any additional circulation price increases by either the Free Press or the News which is not followed by the other." *Id.* 70, 77 (footnotes omitted).

Despite the evidence, the administrative law judge construed the Act to require "convincing evidence of an irreversible economic condition that would produce domination and a downward spiral," *id.* 119, and on that ground recommended against approval of the application.

The Attorney General refused to apply so rigid a construction of the Act. He articulated and applied the following standard for a case involving a failing newspaper not yet caught in a downward spiral:

"If, as all seem to acknowledge, the Free Press is unable unilaterally to restore the paper to a profitable position, and has no realistic prospect of outlasting the News, given the latter's substantial advertising and persistent circulation lead, the danger of financial failure, if not imminent, certainly seems 'probable.'" AG dec. 10, 7.

Unlike the "failing company" test, which was a judicially created exemption from the antitrust laws, the NPA's "probable danger of financial failure" test is a specific *statutory* exemption and the expression of a legislative judgment that the first amendment benefits of a vigorous and competitive press outweigh the potential anticompetitive effects of JOAs. Given the first amendment benefits, courts are not free, as petitioners argue, to diminish or belittle the statutory exemption and ought "not to emasculate the Act in the guise of narrowly construing it." *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983).

The Act requires two determinations: that one of the applicants is failing, that is, "in probable danger of financial failure," and that the JOA will further the statutory intent to preserve editorial diversity among a community's newspapers. 15 U.S.C. § 1803(b). Nothing in the language or the history of the Act suggests that it requires a downward spiral as a necessary predicate for every JOA.² To the contrary, the Attorney General's

² The ALJ's only authority for requiring a downward spiral were some comments by Representative Matsunaga, describing a downward spiral as part of the economic dynamic typically requiring a JOA for the survival of the failing newspaper. *Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 10-11 (1969). Nothing in Representative Matsunaga's remarks describing a scenario that would typically compel resort to the NPA, however, warrants the conclusion that a downward spiral would be a required element of proof in every JOA application.

To the contrary, Representative Matsunaga emphasized that newspapers should not be required to wait until they have already entered a downward spiral before being permitted to apply for a JOA:

"It is not reasonable to assume that a newspaper owner who has other resources and whose newspaper has commenced a downward spiral would put good money after bad. It is more likely that such an owner would seek a merger or sell his assets with the resultant loss of an editorial voice in the community." *Id.* 9.

He assumed that proof of a downward spiral, while required to establish the judicially created "failing company" defense, would not be required to qualify for a JOA:

"Where the existence of independence in news and editorial reporting is challenged by faltering commercial operations, then reasonable steps must be taken to assure continuance of independent news sources. This confrontation of conflicting antitrust values compels one to examine the reasonableness of the action, rather than to accept or reject on a mechanistic test."

* * *

"Once a downward spiral, occasioned by the inter-relationship of advertising, circulation and increasing costs, has led a news-

mandate under the statute is to preserve editorial diversity, and he has discretion to construe and apply the definition of "failing newspaper" so as to effectuate the purpose of the Act.

Amici submit that, in a case such as this one, where approval of the JOA does in fact further Congress' intent to preserve diversity of editorial voices, the Attorney General correctly applied the Act.

II. WHERE THE PROPOSED JOA IS THE ONLY MEANS OF PRESERVING EDITORIAL DIVERSITY IN THE COMMUNITY, THE ATTORNEY GENERAL MUST CONSTRUE THE TERM "FAILING NEWSPAPER" TO EFFECTUATE THE PURPOSE OF THE ACT.

Congress left no room for conjecture about the purpose of the Newspaper Preservation Act: It was enacted "[i]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, . . ." 15 U.S.C. § 1801. Both houses of Congress "believed that authorizing certain joint action between newspapers would serve the best interest of the people of the United States and the first amendment." *Committee for an Independent P-I v. Hearst Corp., supra*, 704 F.2d at 474.³ Indeed, the dec-

paper to the crisis point demanded by the failing company doctrine, a competitor is likely to prefer the demise of the failing newspaper to a cooperative arrangement that, if consummated at an earlier date, could have saved it not only as a commercial enterprise but more importantly, as an alternative independent editorial voice." *Id.* 9, 12.

These remarks were accepted by the Committee in reporting the final version of the Act. 1970 U.S. Code Cong. & Admin. News 3547, 3554.

³ "Nothing is more vital to democratic processes than the reporting of news events and the dissemination of editorial comment and analysis and no industry is more important in the performance of those functions than the newspaper industry. Operating as a private competitive enterprise, a newspaper's

laration of legislative intent expressed in the Act and its legislative history "compel the conclusion that the Act itself is a policy determination that the preservation of editorial diversity through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause." *Id.* 481.

References in the Act's legislative history to the definition of "probable danger of financial failure" utilized in the Bank Merger Act, 12 U.S.C. § 1828(c),⁴ suggest the propriety of noneconomic considerations, such as whether the newspaper identified as failing was put in that position by mismanagement and whether alternatives to a JOA exist. *Committee for an Independent P-I v. Hearst Corp., supra*, 704 F.2d at 478. Consideration of "economic factors which are arguably extrinsic to the newspaper operation," *id.* 477, or relevant noneconomic factors, can only throw more light, not less, on the issue for decision by the Attorney General.

Of the various noneconomic or arguably extrinsic economic factors that might bear upon the propriety of a JOA application, none relates more directly to the legis-

ability to perform its essential role in our society depends not only upon its journalistic excellence, but even more importantly upon its ability to succeed as a commercial venture. . . . We believe that, with respect to the newspaper industry, a choice must be made between fostering editorial competition and diversity on the one hand, and full-blown commercial competition on the other, and that the former must be given precedence." *Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 9-10 (1969) (statement of Rep. Matsunaga on behalf of 59 of 100 sponsors).

"Financially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous or unpopular editorial stands on public issues are an area of legitimate congressional concern." S. 1520, 91st Cong., 1st sess., at 3 (Nov. 18, 1969).

⁴ See *United States v. Third National Bank*, 390 U.S. 171 (1968).

lative intent than whether approving the JOA will in fact preserve diversity of editorial views in the community.⁵ If there is no actual editorial diversity to be preserved by approval of a JOA, there is less of a public interest to counterbalance the anticompetitive effects of the proposed merger.

The first amendment prohibits Congress from legislating editorial independence.⁶ Likewise, the first amendment prohibits the Attorney General from requiring a newspaper to "explore the alternative of changing its editorial policies prior to entering a JOA." See 704 F.2d at 478 n.8. Conversely, "[t]hat Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (Black, J.). It both furthers the intent of Congress and complies with the mandate of 15 U.S.C. § 1803(b) to take into consideration that a proposed JOA will in fact preserve editorial diversity in the community.

As detailed in the Statement of *Amici, infra*, the Attorney General's approval of the Free Press-News application does further the intent of Congress by preserving two historically diverse, indeed often passionately antagonistic, editorial perspectives.⁷ The specific terms

⁵ As pointed out by the Court of Appeals for the Ninth Circuit in the Hearst case, the political viewpoint of the newspaper's publisher, as expressed on the editorial pages, certainly affects the newspaper's business success by attracting or repelling readers and cannot be viewed as a "noneconomic" factor. 704 F.2d at 477-78 n.8.

⁶ S. 1520, *supra* n.3, at 12 (individual views of Sens. Hart, Kennedy, Burdick, and Tydings).

⁷ *Amici* have also separately lodged with the Clerk an appendix of newspaper excerpts that support the Statement of *Amici*. These excerpts are not part of the record, nor was it feasible to compile in the appendix all of the many years of newspapers on which the analysis in this brief is largely based.

of the joint operating agreement which the Attorney General approved ensures each newspaper's continuing vitality by guaranteeing minimum and approximately equal newshole for each and also by creating "newshole banks" to be used for special coverage, which are to be charged to each newspaper as they are used. JOA, art. 3.1(a), at 38-39.

III. THE APPLICANTS' EDITORIAL PERSPECTIVES HAVE BEEN HISTORICALLY AND CONSISTENTLY OPPOSING.

The Detroit community enjoys two major newspapers that have dramatically different visions of the world.⁸ That the community actually *enjoys* two fiercely competitive newspapers is reflected in its newspaper readership rates: Detroit's per capita newspaper readership rates are the highest in the United States.⁹

The Free Press has been a unifying influence in the local coverage of race relations. In covering race relations from the early 1960's, and especially during the 1967 riot, the Free Press helped the white community to view racial integration with greater tolerance.¹⁰ Historically, the Free Press has a strong tradition of leadership in investigative and interpretive reporting, identifying social issues and pushing for reforms. Some of the contributions to the quality of life in the community that are attributable to Free Press reporting in recent years are detailed in the Statement of *Amici*.¹¹

The Detroit community recognizes and values the editorial differences between its two major newspapers, as well as the unique contribution made by the Free Press.

⁸ See Statement of *Amici, infra*, Part A.

⁹ ALJ rec. dec. 16 and n.19. Duplicate readership between the News and the Free Press is also high. *Id.* 38.

¹⁰ See Statement of *Amici, infra*, Part B.

¹¹ See Statement of *Amici, infra*, Part C.

The civic community responded to the JOA application by urging the Attorney General to consider the injury to the city's welfare should the JOA be denied. A representative plea was made by Leon Cohan, senior vice president and general counsel of Detroit Edison, president of the Jewish Community Council of Metropolitan Detroit, and chairman of the Michigan Council for the Arts:

"I am especially concerned that the loss of the Free Press would have a particularly adverse effect on race relations in the Detroit metropolitan area. Recent experience as a member of the Race Relations Task Force of the Detroit Strategic Plan convinces me that Blacks in our community already feel isolated by a perception of negative attitudes on the part of the media. The elimination of a major voice for reason, fairness, and moderation would, I feel, seriously exacerbate that sense of isolation."¹²

The historic editorial diversity between the Free Press and the News, as well as the contributions to the quality of community life that may be attributed to Free Press investigatory reporting inspired by the fierce competition between the two newspapers, are precisely what Congress intended to preserve in enacting the Newspaper Preservation Act.

It is peculiarly appropriate to apply the Act's definition of a "failing newspaper" liberally when so doing will in fact accomplish exactly what Congress intended. Whether the Attorney General's construction of the Act in this case was narrow or broad, his application of the statutory terms was most certainly true to the intent of Congress.

¹² App. to Mem. of Det. Free Press in Opp. to Motion for a Temporary Restraining Order or Stay, Ap. 6, Exh. C.

Mr. Cohan's concerns were repeated by the NAACP, United Negro College Fund, Museum of African American History, and the Detroit Association of Black Organizations. *Id.*

Nor is there any basis for the petitioners' argument that the exemption from the antitrust laws that is created by the Act's provision for JOAs must be narrowly construed. The statutorily expressed purpose of the exemption is to promote first amendment interests by preserving editorial diversity. The first amendment interest in preserving editorial diversity certainly "runs no less deep" than the interests served by the patent infringement exemption established by Congress in 35 U.S.C. § 271(d), which this Court refused to construe narrowly in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-23 (1980). As reiterated in *Dawson*, antitrust exemptions which Congress created to promote a significant competing interest are not to be narrowly construed. It is difficult to imagine any competing interest more significant than the first amendment interest in preserving the diversity of the press.

STATEMENT OF AMICI CURIAE

Two blocks apart, in a downtown Detroit neighborhood of asphalt parking lots and boarded-up hotels, two neon newspaper logos glow against the night sky. Physically, the buildings occupied by the Detroit Free Press and the Detroit News are on the same street; philosophically, they are a world apart. In an era when the one-newspaper town has become the norm, when Americans get most of their information from a local monopoly newspaper or television's bite-size bits of news, Detroit still enjoys two serious, spirited, greatly dissimilar newspapers.

The two papers have dramatically different visions of the world. Historically, the Free Press has been a force for reform and defender of the disadvantaged, while the Detroit News has been the community's voice for restraint and conservatism. The Free Press has continued to address issues of interest and importance to the city, even though Detroit's population has been shrinking dra-

matically.¹³ The paper has consistently paid attention to the issues and concerns of Detroit's black population. Despite the increasing impoverishment of the city's residents and the often divergent interests of the city and suburbs, the Free Press has not abandoned the central city.¹⁴

A. Editorial Diversity.

The differences between the two papers in Detroit are most visible on their editorial pages, where the News and the Free Press regularly disagree on everything from how to take out the trash¹⁵ to how to resolve the most fundamental social and political issues of the age. Their sharply differing editorial positions go back at least 25 years, and the contrast has not abated in the years since Gannett Co. Inc. bought the News and the parties jointly requested a JOA.

¹³ The city of Detroit lost nearly 33 percent of its population from 1960-1984. It led the 10 largest cities in both population decline and in the racial transformation of its population from white to black. During that time, the suburban community outside Detroit grew from 2,092,216 in 1960 to 2,789,127 in 1984. Detroit's suburban black population was 4.5 percent in 1980, an increase of 0.8 percent over a period of 20 years. This compared to the city's increase in the proportion of its black population, as noted above. "Of the ten largest cities in the U.S., Detroit has the largest proportion of Blacks . . ." M.E. Neithercut, *Detroit Twenty Years After: A Statistical Profile of the Detroit Area Since 1967*, at 4, 6, 7, 40 (Wayne State U. Center for Urban Studies 1987) (referred to hereafter as "Neithercut").

¹⁴ While the entire Detroit metropolitan area, including the suburban communities, suffered an increase in poverty rates from 1960-1984, ALJ rec. dec. 15, Detroit's suffering has far outstripped the suburbs'. The city's poverty rate "has nearly doubled since 1979 and per capita income measured in constant dollars has declined nearly 13 percent since 1969. The poverty rate in the City of Detroit rose from 4.9 percent in 1969 to 42.8 percent in 1984." Neithercut, *supra* n.13, at 40.

¹⁵ The two papers were recently on opposite sides in a controversy over scrubbers and ash disposal at a new city incinerator.

During the civil rights revolution, the Free Press was an early advocate of increased black participation in public life. The Free Press endorsed black candidates for mayor in 1969 and 1973; the News endorsed their white opponents. In the days of police-community tension that followed the 1967 riot, the Free Press advocated stronger civilian control of the police, respect for individual civil liberties in police-citizen conflicts, and affirmative action to change the racial composition of the Detroit Police Department. The News was more often concerned with law and order.

The Free Press has been a more frequent and consistent advocate of improving the environment, human services and public school education. The News has been a strong defender of supply-side economics, the Free Press a strong critic. During the Vietnam era, the Free Press was an early and consistent critic of U.S. involvement in the war, the News a strong proponent of intervention. The Free Press has tended generally to be an advocate of civil liberties, the News a defender of the police powers of the state.

In recent years, the two papers have expressed opposing views on abortion, transportation, welfare policy, campaign financing, utility and insurance regulation, Jimmy Carter and Ronald Reagan. They have differed on the MX missile, the Grenada invasion, the causes of crime, the minimum wage, the validity of the independent prosecutor law, the workings of the Michigan presidential primary, and the best means of opposing apartheid in South Africa.

The clash of ideas on the two editorial pages has become an important feature of public life in Michigan and Detroit. At a time when such media critics as Ben Bagdikian complain of "vanilla journalism" and the blandness of editorial page opinions,¹⁶ Detroit readers

¹⁶ B. Bagdikian, *The Media Monopoly* 78 et seq. (1983).

still have the choice of two distinctively different voices from their daily newspapers.

If members of the community want to have their views heard, however, they have a better chance in the Free Press, which devotes more space than the News to reader opinions. In 1988, the Free Press printed 3,803 letters from readers, nearly half again as many as the 2,497 in the News.

B. Free Press Coverage of Race Relations.

In Detroit, which in 20 years changed from two-thirds white to two-thirds black,¹⁷ race has been the subliminal theme, the subtext of almost every news story, regardless of subject. Racial undercurrents informed news of crime, housing, schools, transportation, employment or urban redevelopment.

The Free Press has devoted a large share of its resources to exposing racial injustice and division, attempting to lead the white community toward tolerance of racial integration.¹⁸ Since the mid-1960s, blacks and other minorities have appeared with frequency in Free Press news stories beyond the arenas of entertainment, sports and crime. The Free Press has also moved with alacrity

¹⁷ The city's black population rose from 29 percent in 1960 to 63 percent in 1980. Neithercut, *supra* n.13, at 6.

¹⁸ Three of the Free Press' seven Pulitzer Prizes have been awarded for such coverage:

In 1968, the Free Press was awarded the Pulitzer Prize for distinguished local reporting for its coverage of the 1967 Detroit race riot and its aftermath.

In 1981, Taro Yamasaki of the Free Press won the Pulitzer Prize for outstanding feature photography, for his photographic series showing close-up views of life behind bars at Michigan's Jackson Prison.

In 1989, Free Press photographer Manny Crisostomo won the Pulitzer Prize for outstanding feature photography for his series portraying a year in the life of a Detroit inner city high school.

to hire black reporters and editors.¹⁹ The News' coverage of race relations during that period often failed to reflect the same concern for the black community.

Historians and others have noted the differences in the two newspapers' coverage of racial subjects in that period.²⁰ On the news pages during the '60s and '70s, the Free Press more often tended to report straightforwardly the emerging racial and civil rights issues and the rise and demands of new black organizations. Reports of those events by the News often reflected assumptions, widespread in the white community, that the expression of black discontent was inspired by "outside agitators." Fine, *supra* n.20, at 123. The examples that follow illustrate the role played by the Free Press in counterbalancing the perspective expressed by the News:

—A few weeks before the July, 1967 riot that devastated Detroit, a black man was killed in a city park while protecting his pregnant wife from harassment by a gang of white toughs. The incident horrified the black community. The manner in which it was reported reinforced the perception that crimes against blacks were not taken as seriously by whites as crimes against whites.

The Michigan Chronicle, a black-owned weekly, reported the story in detail. The Free Press carried the story on page one, with pictures of the victim's wife and the accused. The Detroit News briefly reported the slay-

¹⁹ As of June 30, 1989, blacks and minorities make up 17 percent of the professional staff of the Free Press and 11.5 percent of the newsroom supervisors. At the News, the comparable figures are 11.8 percent and 7.4 percent. (Telephone conversations by Free Press writer Barbara Stanton with Detroit News vice president of human resources, Robert Taylor, and Free Press administrative assistant to the executive editor, Grace Bennett [July 14, 1989]).

²⁰ See S. Fine, *Violence in the Model City: The Cavanagh Administration, Race Relations and the Detroit Riot of 1967* (1989) (hereafter referred to as "Fine"); B. Widick, *Detroit: City of Race and Class Violence* (1989) (hereafter referred to as "Widick").

ing on page six, with no mention of the racial issues. A black Detroit News reporter later told a Kerner Commission seminar that when he insisted the paper should run a picture of the victim's wife, he was told, "We don't want to get involved in race issues." Fine, *supra* n.20, at 150.

—Immediately after the 1967 riot, the Free Press published an analysis of the deaths of the 43 who died—33 blacks and 10 whites—and concluded that the majority of the deaths were attributable to nervous, ill-trained or trigger-happy guardsmen and police. The Free Press reported that no charges had been brought against anyone in connection with most of the deaths, which were attributed in official reports to gunfire by unknown persons. The News offered a reward the week after the riot for information regarding the deaths of four white victims. When criticized for showing no concern for black victims, the News responded that the slayings of blacks had all been solved by that time. *Id.* 299-300, 358.

—The News published stories after the riot, drawn from unnamed sources, reporting that organized black snipers had been operating in the city. No evidence was ever found to support those claims by any investigatory entity, including the Kerner Commission, New Detroit (the city's urban coalition), or law enforcement authorities. Widick, *supra* n.20, at 188.

—In 1968, the year after the riot, the News began a daily police blotter feature called Crime on Detroit Streets, which detailed every mugging and purse-snatching in the city. The feature described suspects by race. Some of the stories were accompanied by boxes listing the number of whites victimized by blacks and vice versa.

—In 1971, with the city in turmoil over school integration, the News again relied upon unnamed sources to report that "a deliberate, well-financed effort was being made by outside agitators to cripple the schools in the

hope of toppling the system." Widick, *supra* n.20, at 215-16.

The tone and content of the News' coverage of the black community in 1989 is significantly different from the tone and content of its coverage during the 1960s. The point remains that during a volatile period in the city's history, Detroit benefitted greatly from having two independent editorial perspectives.

C. Free Press Investigative Reporting.

The late J. Montgomery Curtis, long-time executive director of the American Press Institute, once said that the measure of a great newspaper is its ability to publish exclusive stories of great importance and its willingness to take unpopular editorial positions early in the debate. The Free Press continues to meet this measure by leading the Detroit community in exposing injustices and demanding social reforms:

—In 1988, a Free Press series exposed and documented a pattern of racially discriminatory lending practices by Detroit banks. The series prompted half a dozen local banks to pledge three billion dollars for home mortgage and improvement loans and for business development within the city—an unprecedented financial commitment to the city by its own financial institutions.²¹

—In 1987, a Free Press series on the causes of Michigan's unusually high infant death rate motivated the Michigan legislature, health department, and private foundations to commit more than \$2.5 million in additional spending on prenatal care and nutrition.²²

—In 1986, the Free Press ran a series of stories on the state's treatment of juvenile offenders. The series ex-

²¹ App.: "Detroit Banks: The Race for Money."

²² App.: "The Silent Epidemic."

posed the absence of accountability by the courts and the state's department of social services, and inadequate sentencing and rehabilitation.²³ Within a year, the Michigan legislature enacted a statute making juvenile court proceedings public.

—In 1985, a Free Press series on the illegal early release of inmates from state prisons, caused by a serious shortage of prison space, prompted a \$750 million state prison building program which is intended to double the number of prison beds.²⁴

—In 1980-81, the Free Press set up its own foreign bureaus in Canada, Africa and Eastern Europe, at a time when many United States newspapers had long since abandoned expensive overseas operations and opted to rely on wire coverage instead. The News has no similar system of full-time correspondents abroad. Free Press foreign coverage has included special reports on the African National Congress, the birth of Solidarity in Poland, Palestinians under Israeli rule, Israel, and the Soviet Union.

The number of Pulitzer Prizes is not an infallible measure or the only measure of a newspaper's quality, but it is an indication of it. Since 1932, the Free Press has won seven of the 11 Pulitzer Prizes awarded to Michigan newspapers; the Detroit News has won two.²⁵

* * *

²³ App.: "Young Outlaws."

²⁴ App.: "Revolving Door Prisons."

²⁵ Pulitzer Prizes have been awarded to the Free Press for its local news and investigative reporting, public service, editorials, photography, and mastery of language:

1932: For mastery of the English language, to staffers Douglas Martin, James Pooler, William Richards, John Sloan and Frank

Opponents of the JOA have suggested that once financial pressures on the two papers are eased, attention to quality and serious reporting will diminish. But in what may be the only systematic study of the content of JOA papers, the newspapers in the cities of San Francisco, Albuquerque, Knoxville, and Charleston were determined to behave more like competitors than monopolists after JOAs were approved.²⁶

Amici would prefer that what has been called the "last great American newspaper war" would go on forever in Detroit. Without the help of the Newspaper Preservation Act, it cannot.

Webb, for their coverage of an American Legion convention parade in Detroit.

1945: For most distinguished and meritorious public service, to staffer Ken McCormick for investigating corruption among state legislators in Lansing. McCormick's work anticipated investigatory journalism by nearly 30 years.

1955: For distinguished editorial writing, to associate editor Royce Howes for explaining the causes of a wildcat UAW strike against Chrysler. The Free Press pioneered the field of labor reporting.

1956: For distinguished local reporting on a deadline, to executive editor Lee Hills for his daily coverage of three weeks of "secret" negotiations among the UAW, Ford, and General Motors which culminated in the first guaranteed annual wage.

1968: For distinguished local reporting, to staff coverage of the 1967 Detroit riot and its aftermath.

1981: For outstanding feature photography, to Taro Yamasaki for series on life behind bars at Jackson Prison.

1989: For outstanding feature photography, to Manny Crisostomo for series on a year in the life of a Detroit high school.

Sports writer Mitch Albom's regular columns about such issues as the temptations faced by athletes to abuse drugs, alcohol, and steroids; ethical issues in professional sports; and youthful dreams of escaping from city ghettos by way of the boxing ring or basketball court won the Associated Press' best sports columnist award for three consecutive years, from 1986-1989.

²⁶ S. Lacy, "Content of Joint Operation Newspapers," in *Press Concentration and Monopoly* (Picard, ed. 1988).

In most of the country, including 1,505 American cities with monopoly press ownership, there is no diverse and competitive press. Few of the 25 remaining cities with separately owned newspapers have a genuine rivalry. Most often in the remaining large, dual-newspaper markets, the competition is between one dominant, healthy newspaper and a failing or marginal rival.

It is 158 years since the Democratic Free Press and Michigan Intelligencer first appeared on the brick-and-mud streets of Detroit. In its infancy, the newspaper supported Andrew Jackson for president and crusaded for statehood for Michigan. It dispatched reporters to the Civil War and sent Michigan's first correspondents to Washington. It hosted the meeting in 1868 where the Associated Press was born and in 1898 it christened Detroit's baseball team the Tigers, for the players' orange-and-black-striped socks.

In Detroit, the ideal of two independent and countervailing newspapers still exists. What the Newspaper Preservation Act seeks to protect, we have and wish to preserve.

CONCLUSION

The editorial diversity that the Newspaper Preservation Act was enacted to preserve is more than a legislatively identified public interest. It is the fundamental prerequisite of a vigorous and free press—a foundation stone of the Bill of Rights and an essential element of democratic society.

The petitioners do not challenge the legislative judgment that first amendment interests in a free and vigorous press outweigh the interests in competition that are protected by the antitrust laws, but they demand a construction of the Newspaper Preservation Act that would effectively deprive the Attorney General of the power to execute his legislative mandate to preserve editorial diversity. The Act must be construed in a way that

permits the Attorney General to effectuate the purpose of the Act. He must be allowed the discretion to apply the term "failing newspaper" to preserve actual editorial diversity.

The Free Press' death would mean more than the loss of just 2,000 jobs in a city that can ill afford to lose one, or of just another vehicle for advertising, or another source for the lottery numbers and the sports scores. Its loss would be the death of just what the Newspaper Preservation Act was meant to save: a bold, idealistic, and irreverent newspaper that to this day remains faithful to the best traditions of a free press.

Respectfully submitted,

BARBARA HARVEY
925 Ford Building
Detroit, MI 48226
(313) 962-2770
Counsel for Amici Curiae
Jane Daugherty, et al.

Dated: August 11, 1989